

APPENDIX N

Waste Coal Access Agreement and Memorandum of Understanding for the Anjean Coal Refuse Pile*

** The content of Appendix N has been changed for the Final EIS. The Conflict of Interest Disclosure Statement that was Appendix N in the Draft EIS has been moved to the end of Chapter 7 (List of Preparers) in Volume 1 of the Final EIS.*

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**PROSPECTIVE PURCHASER AGREEMENT
and
WASTE COAL ACCESS AGREEMENT**

This Prospective Purchaser Agreement and Waste Coal Access Agreement (“Agreement”), entered into this 12 day of August, 2004, by and between WESTERN GREENBRIER CO-GENERATION, LLC, a West Virginia limited liability company (“WGC”) and WESTERN GREENBRIER BUSINESS DEVELOPMENT CORPORATION, a West Virginia corporation (“BDC”), and the WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, an agency of the State of West Virginia (“DEP,” and together with WGC and BDC, the “Parties”).

WHEREAS, WGC desires to develop, construct and operate a co-production demonstration project (the “Project”), to demonstrate the feasibility of burning waste coal through use of the inverted-cyclone CFB process and the ability to both create useful ash byproducts and to remediate existing environmental waste coal hazards in the process; and

WHEREAS, it is estimated that more than 4 million tons of waste coal are located upon a certain tract of approximately four hundred (400) acres of real property located on South Fork of Big Clear Creek near Anjean, Greenbrier County, West Virginia—an area previously permitted by Royal Scot Minerals, Inc. pursuant to the West Virginia Surface Coal Mining and Reclamation Act (the “Property”); and

WHEREAS, at a June 19, 2003 bankruptcy court hearing, BDC was the successful bidder to purchase the Property from the bankruptcy estate of Royal Scot Minerals, Inc. (the “BDC Bid”); and

WHEREAS, the BDC Bid provides that as a condition to closing on the purchase of the Property (“Closing”), BDC, WGC, and DEP shall enter into a Prospective Purchaser Agreement (“PPA”) to insulate BDC against certain environmental liabilities incident to its purchase and ownership of the Property; and

WHEREAS, BDC, in furtherance of its goal to stimulate economic development in Western Greenbrier County and mindful of the need to protect itself against environmental liabilities associated with the ownership of the Property, desires (i) to execute a PPA with DEP; (ii) to acquire the Property; (iii) to allow WGC to access and remove the waste coal on the Property for use in the Project at no cost; and

WHEREAS, WGC, in furtherance of its desire to provide the United States Department of Energy with documentary evidence of its right to access the waste coal on the Property and mindful of the need to protect itself against certain environmental liabilities associated with its removal of waste coal from the Property, desires (i) to execute a PPA with DEP and BDC; and (ii) to negotiate toward the execution of a no-cost reclamation contract with DEP and to undertake reclamation efforts thereunder, all pursuant to that Memorandum of Understanding

between WGC and DEP dated as of March 2, 2004 ("MOU") and incorporated by reference herein; and

WHEREAS, DEP, to induce WGC to commit to undertake the reclamation efforts identified in the MOU and thereby to secure for the benefit of the State of West Virginia the substantial benefits associated therewith, desires to execute this Agreement.

NOW, THEREFORE, in recognition of the consideration set forth above and other good and valuable consideration, the sufficiency of all of which is hereby acknowledged, the Parties agree as follows:

1. Nothing in this Agreement or the MOU shall be construed to require DEP to issue an air pollution permit to WGC or any other entity.
2. BDC will acquire the Property under separate arrangements with WGC.
3. Before removing coal refuse from the Property, WGC must submit to and receive approval from DEP of a Reclamation Plan and Contract for the Property. In accordance with W.Va. Code § 22-3-28(d), WGC must also submit to DEP a performance bond, acceptable to DEP, that will ensure WGC's faithful performance of the Reclamation Plan and Contract. The Reclamation Plan and Contract shall detail the manner in which WGC will remove coal refuse from the Property and shall detail the manner in which WGC will reclaim the Property areas, including the coal refuse areas, WGC disturbs.
4. The Property is currently producing pollutional discharges that without treatment would cause water pollution and violations of the West Virginia Water Pollution Control Act. In addition, the property currently features the presence of Hazardous and Solid Waste. For so long as BDC and WGC are developing, permitting and financing the Project and properly carrying out the terms of the Reclamation Plan and Contract, DEP will:
 - a. Agree not to enforce as against BDC or WGC the provisions of (i) the West Virginia Water Pollution Control Act, W. Va. Code §22-11-1, et seq. ("WPCA"), as it relates to the condition of the Property prior to Closing; and (ii) the West Virginia Hazardous Waste Management Act, W. Va. Code §22-18-1, et seq. ("HWMA"), as it relates to the condition of the Property prior to Closing, including the potential existence of hazardous waste that may be buried on site and thus not identified as of the Closing. Notwithstanding the preceding, WGC shall be responsible for: (1) compliance with all environmental laws to the extent WGC's activities create or contribute to new violations of law that are unrelated to the pre-Closing condition of the Property, (2) compliance with all environmental laws to the extent WGC's activities contribute to violations of law occurring on the Property as a result of the pre-Closing condition of the Property.

- b. Intervene or otherwise participate in any third party proceeding in which it is alleged that BDC, its successors in ownership of the Property, or WGC are liable under the WPCA or the HWMA for the conditions identified in subsection (a) of this Section, for the purpose of upholding the letter and intent of this Agreement and the MOU.

5. As for the Hazardous and Solid Waste presently on the Property that DEP has identified in various internally generated reports ("Identified Waste"), DEP will arrange and, if necessary, pay for the removal and disposal of all Identified Waste on the Property at the time of Closing. As part of this effort, DEP may require parties other than BDC or WGC to cleanup such Identified Waste. BDC and WGC shall have no obligation to remove and dispose of, and no liability associated with the existence, removal, or disposal of, the Identified Waste that exists on the Property at the time of Closing. If DEP does not choose to or cannot require parties other than BDC and WGC to remove the Identified Waste, DEP's Office of Special Reclamation will itself remove from the Property the Identified Waste.

6.

- a. WVDEP's Office of Special Reclamation is currently treating polluttional discharges, including blackwater discharges¹, which are coming from the coal refuse piles on the Property. Up until the time that WGC begins removing coal refuse, WVDEP will continue to treat all polluttional discharges, including blackwater discharges, which emanate from the coal refuse piles on the Property. After WGC begins removing coal refuse, WVDEP will: (1) Not be responsible for treating blackwater discharges which come from the Property, (2) Not be responsible for treating polluttional discharges coming from areas of the Property other than the coal refuse piles, and (3) Treat all polluttional discharges, excluding blackwater discharges, coming from the coal refuse piles on the Property.
- b. After it begins its operations on the Property, WGC shall: (1) Assume responsibility for, prevent and eliminate to the extent possible, and treat all non-coal refuse area polluttional discharges it causes and/or contributes to, (2) Undertake reclamation efforts on the Property in accordance with the terms of the MOU and the Reclamation Plan and Contract.
- c. When it begins removing coal refuse, WGC shall additionally assume responsibility for, prevent and eliminate to the extent possible, and treat all blackwater discharges that come from the coal refuse areas of the Property. Nothing within this subsection shall be construed to limit the limitation on liability that WGC shall enjoy as a result of Paragraph 4a of this Agreement.

¹ A "blackwater discharge" is a discharge of coal or coal refuse particular that, without treatment, would cause a violation of narrative water quality criteria under the WPCA.

- d. The parties understand that, after the entry of this Agreement, the DEP may permit one or more entities to conduct coal mining and coal mining related operations on the Property. This Agreement shall in no way eliminate any duty that such entity(ies) may have to prevent, eliminate, and treat polluttional discharges that such entity(ies) may cause or contribute to.
- e. Notwithstanding any of the preceding sections, WGC shall not be held accountable by WVDEP for polluttional, including blackwater, discharges that occur in a water of the State solely as a result of a major storm event (i.e. a 100 year storm event).
- f. The Parties understand that DEP may terminate the Reclamation Plan and Contract, this Agreement, the MOU, and WGC's work on the Property if WGC violates the Reclamation Plan and Contract, or environmental laws that DEP may by the terms of this Prospective Purchaser Agreement enforce against WGC, in a negligent, grossly negligent, or more legally egregious manner.

7. Upon Closing, BDC will grant WGC and, to the extent necessary and contemplated by the MOU, DEP: (i) free and full access to the Property and all waste coal located thereon for the purpose of making investigations, inspections, appraisals, surveys (including but not limited to, the cutting of survey lines and putting up markers and driving stubs and stakes), site analyses, engineering studies, core sampling for engineering reports, sampling and analysis of coal, coal fines, and waste coal and the locating of existing rights of way, easements and utilities; (ii) exclusive rights to remove all the waste coal from the Property for use in the Project at no cost, to return alkaline material to the Property, and otherwise to undertake reclamation efforts on the Property in accordance with the terms of the MOU and the Reclamation Plan and Contract.

8. The Parties represent and warrant that each is duly authorized to execute this Agreement and that the Agreement is enforceable according to its terms.

(signature page follows)


Dated as of the date set forth above.

**WESTERN GREENBRIER
CO-GENERATION, LLC**

By: 
Wayne D. Brown

Its: Co-Manager

**WESTERN GREENBRIER BUSINESS
DEVELOPMENT CORPORATION**

By: 
Ralph D. Williams

Its: President

**WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

By: 
Allyn Turner

Its: Director, Division of Water and Waste Management

**WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

By: 
Ken Ellison

Its: Director, Division of Land Restoration

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding entered into this 2nd day of March, 2004, by and between the **WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION** (the "DEP") and **WESTERN GREENBRIER CO-GENERATION, LLC**, a West Virginia limited liability company ("WGC").

WHEREAS, WGC proposes to construct and operate a clean-coal, co-production demonstration project in Rainelle, West Virginia (the "Project"), utilizing waste coal from various refuse sites in the Project vicinity ("Waste Coal") as a primary fuel component; and

WHEREAS, there are numerous Waste Coal refuse sites in West Virginia, many of which constitute present or future environmental hazards and some of which are or will be the DEP's responsibility to remediate pursuant to applicable laws (collectively, "Waste Coal Sites"); and

WHEREAS, DEP has identified some post-1977 Waste Coal Sites for which the applicable reclamation bonds have been forfeited and for which DEP has the statutory responsibility to remediate with funds from the Special Reclamation Fund ("Forfeited Sites"), including in particular the Royal Scot waste coal site near Anjean, West Virginia (the "Anjean Site"); and

WHEREAS, incident to DEP's statutory obligations and pursuant to its authority to reclaim the Anjean Site and other Forfeited Sites, DEP may hire contractors to develop reclamation plans, hire contractors to assist in implementation of reclamation plans, take possession of and remove Waste Coal from Forfeited Sites, and otherwise exercise control over Forfeited Sites during its reclamation operations; and

WHEREAS, DEP is concerned about the financial impact that reclaiming the Forfeited Sites, including the Anjean Site, may have on the Special Reclamation Fund, and is also concerned with the ongoing adverse impact of the Forfeited Sites on the environment; and

WHEREAS, incident to the operation of the Project, WGC proposes to remove Waste Coal from the Anjean Site for use as a fuel source for the Project and to return alkaline material to the Anjean Site for use in the reclamation processes at that site, all by serving as a no-cost reclamation contractor for, and under the supervision and direction of, DEP (collectively, and described in more detail herein, the "WGC Proposal"); and

WHEREAS, in order to meet certain funding-related Project milestones, WGC seeks to demonstrate to United States Department of Energy that DEP is generally willing to cooperate with WGC to provide WGC with access to Waste Coal from the Anjean Site incident to DEP's statutory reclamation efforts as set forth in the WGC Proposal, and DEP is willing to demonstrate its general willingness to do so in this Memorandum of Understanding.

NOW, THEREFORE, the parties hereto hereby set forth their mutual understandings and intentions in respect of the WGC Proposal as follows:

1. DEP agrees in principal with the WGC Proposal as described herein and will cooperate with WGC to implement the WGC Proposal at the Anjean Site. WGC understands that DEP's agreement and cooperation do not absolve WGC of its responsibility to obtain permits required of it by the DEP that may be necessary for WGC to operate certain facilities in Greenbrier County, such as WGC's proposed co-generation power plant operations. WGC recognizes that this MOU does not serve as DEP's approval or endorsement of those permits, including applicable air pollution permits.

2. WGC will (A) pay for the development of a remediation plan for the Anjean Site ("Remediation Plan"); (B) secure DEP approval of the Remediation Plan; (C) give the Remediation Plan to DEP for it to own, administer and implement; and (D) serve as a no-cost contractor to implement portions of the Remediation Plan at DEP's direction and under DEP supervision pursuant to a no-cost reclamation contract with one or more phases ("Reclamation Contract").

3. The WGC Proposal has the following essential elements with respect to the Anjean Site:

(A) pursuant to the Reclamation Contract, WGC will gradually remove waste coal from the Anjean Site in a series of consecutive phases;

(B) as required by DEP, WGC will provide a performance bond for each phase of the work;

(C) as long as the waste coal does not qualify as "coal" under ASTM standards, WGC will not be required to obtain a West Virginia Surface Coal Mining Act permit for its removal of waste coal from the Anjean site;

(D) WGC will return as much alkaline material to the Anjean Site as DEP may determine is needed to reclaim the Anjean Site in accordance with the Reclamation Contract;

(E) As part of its Reclamation Contract for the Anjean site, WGC will mix the alkaline material with the unused waste material to neutralize it, removing the potential for acid mine drainage at the Anjean Site, thereby

gradually reducing the amount of effort and cost needed to treat the ponds at the Anjean Site; and

(F) by the conclusion of this process, the entire Anjean Site permitted site will be reclaimed in accordance with initial or modified revoked Royal Scot Minerals surface coal mining permit. DEP will be responsible for reclaiming the parts of the permit not disturbed by WGC. In addition, DEP will be responsible for treating pollutional discharges associated with acid mine drainage emanating from all parts of the permit, including those parts of the disturbed by WGC. WGC shall be responsible for reclaiming all other parts of the permit it disturbs and for controlling stormwater or "blackwater" discharges in accordance with the Reclamation Contract during its operations.

4. DEP understands the importance of the WGC Proposal to the development, construction and operation of the Project, and further understands that in order to finance the Project on a tax-exempt basis, WGC may not purchase Waste Coal from any source.

5. DEP and WGC are willing to explore the feasibility of extending the WGC Proposal to (i) other Forfeited Sites and (ii) other Waste Coal Sites covered by the federal Abandoned Mines Land program.

6. DEP believes that the WGC Proposal may enable DEP to carry out its reclamation obligations at the Anjean Site on a more cost-effective basis and thereby reduce the future financial impact on the Special Reclamation Fund of reclamation efforts at the Anjean Site.

7. DEP also believes that the removal of the coal refuse pile will help to minimize present and future adverse environmental effects that the coal refuse pile, if left in place, might otherwise produce.

8. DEP and WGC agree to cooperate on the development of site-specific details with regard to the Anjean Site, including but not limited to the relative areas of responsibility for reclamation (i.e., water treatment, waste coal removal, ash delivery and mixing with unused material, shaping of site, planning, etc.). DEP will retain full and final authority as to these details and otherwise as to the development and implementation of any Remediation Plan and contract specifications.

9. WGC's utilization of coal ash is authorized under this Memorandum of Understanding unless the use of coal ash for the specific purposes proposed by WGC becomes prohibited by law.

(signature page follows)

Dated as of the date first above written.

**WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

By: Ken Ellison

Its: Director

**WESTERN GREENBRIER
CO-GENERATION, LLC**

By: [Signature]

Its: Co-Manager